FILED
JAN 10 192

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 156

L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA,

Petitioner,

v.

MILTON DAIRY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HAYDN S. COLE,
Attorney for Respondent.

INDEX.

	Page.
Question Presented	1
The Statute	2
Statement of the Facts	3
Argument	5
Conclusion	8

AUTHORITIES CITED.

Cases:

Edwards v. Douglas, 269 U. S. 204 5

Statutes:

Revenue Act of 1918, C. 18, Sec. 326 (a) (3) 40 Stat. 1057 2

Revenue Act of 1921, C. 136, Sec. 301, Sec. 1400, 42 Stat. 272, 320 2

Revenue Act of 1926, Sec. 284 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. ————

L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MINNESOTA,

Petitioner,

v.

MILTON DAIRY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

The question now before this court is, should a writ of certiorari issue to review the decision of the Court of Appeals because that decision involved an important question of Federal law which has not been but should be settled by this court; in other words, is this such a special or important case that this court should grant the petition?

THE STATUTE.

Revenue Act 1918, C. 18, 40 Stat. 1057, 1092.

Sec. 326 (a) That as used in this title the term "Invested Capital" for any year means * * *

* * * * * * *

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year.

Said Statute and all excess profits tax laws were repealed or expired by limitation December 31, 1921. Revenue Act 1921, Sec. 301 and Sec. 1400, C. 136, 42 Stat. 272, 320.

The last return for and payment of any excess profits taxes was due in 1922. The four-year limitation in Section 284, Revenue Act of 1926, has run as to all taxes paid in 1922, and for which no claim for refund has been made.

STATEMENT OF THE FACTS.

The statement of facts in petitioner's brief is correct, except the use of the word "alleged" applied to profits, to which respondent objects, as hereinafter set out.

The Court of Appeals decided that undivided profits constitute part of the invested capital (of Section 326 (a) (3), Revenue Act of 1918), upon which respondent was entitled to a credit and deduction, and that the Department's regulation requiring restoration of depleted capital was contrary to the law.

On page 7 of petitioner's brief is stated the "Specification of Error to be Urged" as follows:

> "The Court erred in holding that under Section 326 of the Revenue Act of 1918 the invested capital of a corporation can be increased by *alleged* earned *surplus or* undivided profits where there exists an operating deficit in excess thereof."

The italics are respondent's and point out the errors in petitioner's only proposed specification:

1st. *Alleged* means "asserted to be true but not proved." On page 23 of Transcript, among the stipulated facts, appear,

> "That the net income of the plaintiff for the fiscal year ending February 28th, 1918, amounted to $11,489.26" and
>
> "That the net income of the plaintiff for the fiscal year ending February 28th, 1919, amounted to $22,908.14,"

and on page 22 of the Transcript is the stipulated fact that "additional Income and Excess Profits Tax" against the plaintiff were assessed by the Commissioner for said

years 1918 and 1919 respectively on the aforesaid net income. It is part of this "additional" tax that was assessed and paid under protest that respondent brought its action to recover.

Are such profits which have been subjected to and paid an excess profits tax reaching to 80%, "alleged"?

2nd. There is not and never was any "surplus or" in this case, except as the Special Attorney has steadily persisted in ignoring "undivided profits" and emphasizing "surplus." This respondent has never claimed a surplus, does not now claim a surplus, and has not the hardihood to claim any rights by virtue of a "surplus". This respondent had "undivided profits," has paid heavy taxes on "undivided profits" and desires to recover "Additional Excess Profits Tax" which it was compelled to pay on these "undivided profits," because the Commissioner would not permit respondent to earn and keep eight per cent upon these "undivided profits" before imposition of the heavy excess profits tax.

ARGUMENT.

It is respectfully submitted that none of the reasons for granting the writ set out in the petitioner's brief justify the granting of the petition. Taking these in order:

1. The Circuit Court of Appeals did not misconstrue Section 326 (a) (3) of the Revenue Act of 1918. On the contrary, that Court's construction followed and applied this Court's definition of "undivided profits" in *Edwards v. Douglas,* 269 U. S. 204, and quoted at length from that decision (see p. 33 Transcript). Respondent will not attempt to burden this court with another version of reasons so clearly and emphatically given in the opinion of the Court of Appeals. It is submitted that that opinion (pp. 32, 33, 34, 35 Transcript) so convincingly sets forth the law of this case, that on the merits the writ should be denied.

2. The second reason fails in that no issue in this case involves the definition of surplus, as we have stated above. No claim is made that Milton Dairy Company had a surplus.

The respondent claims that the respondent's profits for the years 1918 and 1919, on which the respondent paid income tax, excess profits and war profits taxes, and which earnings remained in the business, are *undivided profits* within the meaning of Section 326 (a) (3).

The tax was assessed by the Commissioner of Internal Revenue, the case tried for the government in the District Court, argued in the Circuit Court of Appeals, and is now brought to this court, practically all action and argument

is based upon the absence of a surplus, and not, as the facts demand, upon the existence of "undivided profits."

3. There is nothing in petitioner's reason No. (3) (top p. 8 petitioner's brief) but a broad, indefinite statement that a proper construction of Sec. 326 is "fundamental in auditing many thousands of corporation returns, etc.," and "affects a large number of cases not finally closed." This may all be true. The statement might have been broader, more comprehensive, if it had said that a proper construction of the Revenue Act of 1918 is "fundamental in auditing, etc." Why limit it to Section 326? Section 326 is long, contains many provisions applying to invested capital, intending to, and did, affect a wide range of corporate circumstances and conditions, and even though inapplicable to any tax accruing after 1921, there are probably cases pending under some of the provisions of the section. But the only provision in which this case is interested is (a) (3). The only question in this case is, must depleted capital be restored before undistributed undivided profits are entitled to a deduction?

The Commissioner has information, and was in a position to state whether there are other cases pending to be affected by this case, and in the absence of a definite statement, the court is justified in disregarding a very general statement with reference to the long section 326.

Petitioner does not state that there is another case pending anywhere that will be affected by this case. This respondent is certain there are few, if any because:

(1) Respondent can find but one ruling of the department on the question here, Art. 838, Regulations 45, 1920 Edition, and can find no other ruling or interpretation, or record of any action or any case like

the one at bar. Certainly no great number could have escaped attention.

(2) Taxation of earnings of a corporation made since December 31, 1921, cannot be affected since the law was repealed or expired by limitation on that date, and the last excess profits tax was payable in 1922.

(3) The Statute of Limitations, Sec. 284, Revenue Act of 1926, applies to all taxes paid in 1922. The limitation is four years.

(4) More than five years have passed since any earnings were subject to excess profits tax.

4. The unimportance of petitioner's reason (4) is apparent from the answer above made to reason (3) and particularly because of the Statute of Limitations. There will be no more taxpayers' return under the repealed law, and the practice of the Department under its provisions is about at an end. Of the "long-established and accepted practice of the Treasury Department", a change of which is said to be threatened, it is difficult to speak without sarcasm. Veneration for the practice of the Department ceases when one thinks of the hundreds of millions of dollars that this court has compelled that Department to refund. The regulations and practice of that Department, fortunately for the taxpayer, are not authority here.

5. There is nothing persuasive in reason (5).

The Board of Tax Appeals has filed over two thousand decisions. Petitioner cites three out of this vast number in support of the argument that the decision of the Circuit Court of Appeals is "contrary to the uniform decisions of the U. S. Board of Tax Appeals."

Long Beach Development Co. v. Commissioner and *Gould Coupler Co. v. Commissioner* (neither yet reported) are not at all in point.

It is surprising that petitioner cites Appeal of *Valdosta Grocery Co.*, 2 B. T. A. 727. That decision cites, and seems to have been decided largely on authority of, the decision of the District Court against respondent in the present case, which decision was reversed by the Circuit Court of Appeals. That the Board of Tax Appeals in two and one-half years of its existence has decided but a single appeal, even remotely resembling the present case, is evidence of the strongest kind that the decision of the Circuit Court of Appeals has such a restricted application that the writ should be denied.

CONCLUSION.

This case involves the sum of $1,804.19.

It was correctly decided in the Court of Appeals.

The law under which it arose was a war measure repealed or expired December 31, 1921.

The Statute of Limitations has run on all taxes paid in 1922.

There are no special or important reasons why this court should review the decision below.

It is asked that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

HAYDN S. COLE,
Attorney for Respondent.